STATE OF MICHIGAN

COURT OF APPEALS

GLORIA JACKSON,

Plaintiff-Appellant,

v

LAKER GROUP, L.L.C., and KROLL CONSTRUCTION COMPANY,

Defendants-Appellees.

UNPUBLISHED
November 3, 2005

No. 261588
Oakland Circuit Court
LC No. 04-058216-CH

LAKER GROUP, L.L.C.,

Plaintiff-Appellee,

v

GLORIA JACKSON,

Defendant-Appellant.

No. 261594
Oakland Circuit Court
LC No. 04-058945-CK

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In Docket No. 261588, plaintiff, Gloria Jackson, appeals as of right from a circuit court order granting summary disposition in favor of defendant Laker Group, L.L.C. (the "Laker Group"), and dismissing Jackson's complaint to quiet title and for injunctive relief, and the circuit court order granting summary disposition in favor of defendant Kroll Construction Company (Kroll Construction). In Docket No. 261594, defendant Jackson appeals as of right from a circuit court order granting summary disposition in favor of plaintiff Laker Group with regard to its eviction claim and providing for a writ of restitution to issue. We affirm.

This case arose out of the foreclosure sale of residential property formerly belonging to Jackson located at 21201 Kipling in Oak Park, Michigan. Jackson purchased the property in July 1995 and began using it as a residence. Jackson contracted with Kroll Construction through its salesman, Avery Warnick, for bathroom remodeling work at the price of $8,300. Jackson paid $5,000 by check and financed the remaining $3,300 with a mortgage to Kroll Construction in that amount to be paid in monthly installments upon completion of the work. Pines Investment

Company ("Pines Investment") financed the project and was responsible for collection.

Jackson was unsatisfied with the bathroom remodeling work and made no payments toward the financed amount. Jackson, at her deposition, testified that the floor tiles and walls had cracked. Thereafter, Pines Investment began the necessary steps to foreclose on the mortgage by advertisement. On March 27, 2001, a mortgage foreclosure sale was held, and Kroll Construction obtained the sheriff's deed to the property for $4,180.57, apparently, the amount of the debt. Jackson never redeemed the property during the statutory redemption period that followed the sale. On November 11, 2003, Kroll Construction conveyed its interest in the property to the Laker Group by a quitclaim deed for the price of $7,000.[1]

Subsequently, the Laker Group filed an eviction action in the 45-B District Court. According Jackson's deposition testimony, she only became aware that Kroll Construction sought foreclosure based on the mortgage when she received the summons and complaint from the Laker Group for eviction. Jackson opposed the eviction and filed a counterclaim to quiet title to the property and for injunctive relief. The district court ruled that it lacked jurisdiction over Jackson's quiet title claim. Consequently, plaintiff filed the quiet title action in the Oakland Circuit Court. The Laker Group also re-filed its eviction action in the Oakland Circuit Court. The circuit court entered an order consolidating the two actions. Thereafter, the circuit court granted summary disposition in favor of Laker Group and Kroll Construction in all regards, dismissed plaintiff's complaint, and provided for a writ of restitution to Laker Group.

Jackson argues that the trial court erred in granting summary disposition in favor of Kroll Construction and the Laker Group where there existed genuine issues of material fact regarding the validity of the underlying mortgage and the foreclosure sale. We disagree.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Our review is limited to the evidence before the trial court at the time the motion was decided. *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). A motion for summary disposition tests the factual support for a claim based on documentary evidence that the parties provided. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Because the trial court evaluated documents beyond the pleadings in ruling on the motions for summary disposition, it is appropriate to analyze the trial court's decision under MCR 2.116(C)(10). See *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997). In evaluating a motion under MCR 2.116(C)(10), a reviewing court must consider the whole record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence offered by the parties. *Corley*, *supra* at 278. Such documentary evidence to support a position is required when judgment is sought based on the lack of a material factual dispute. MCR 2.116(G)(3)(b). When the evidence demonstrates that no genuine issue of material fact exists, the movant is entitled to judgment as a matter of law. *Corley*, *supra* at 278. Furthermore, whether to set aside a mortgage foreclosure sale is a question resting largely within the discretion

[1] The property was also burdened with two additional mortgages and delinquent taxes.

of the trial court and should not be interfered with on appeal unless it is apparent that such discretion was abused. *Nugent v Nugent*, 54 Mich 557, 558-560; 20 NW 584 (1884).

First, Jackson claims that foreclosure by advertisement was improper because Kroll Construction lacked the authority to initiate foreclosure proceedings. Jackson contends that the power to sell was not invoked because the mortgage installment payments were not due until the bathroom remodeling work was complete.

A mortgagor is permitted to hold over after foreclosure by advertisement and challenge the validity of the foreclosure sale in the summary proceedings. *Manufacturers Hanover Mortg Corp v Snell*, 142 Mich App 548, 553; 370 NW2d 401 (1985). When a mortgagor brings such a challenge to the foreclosure sale, the mortgagor is limited to the defenses that can be raised in a summary eviction proceeding. *Id*. at 553-554. In an eviction proceeding, a mortgagor is limited to challenging the validity of the foreclosure sale procedures, not the other "underlying equities," including those "bearing on the instrument." *Reid v Rylander*, 270 Mich 263, 267; 258 NW 630 (1935). Because Jackson failed to challenge the foreclosure by advertisement before the eviction proceedings were initiated and before the lapse of the redemption period, we conclude that she is precluded from challenging the validity of the underlying mortgage. And, because Jackson admitted in her deposition testimony that she owed Kroll Construction money on the mortgage, received a payment book from Kroll Construction and never sent a single payment, she cannot assert that Kroll Construction lacked the authority to institute the foreclosure under the terms of the mortgage. Thus, on review de novo, summary disposition was appropriate in this regard.

Second, Jackson claims that notice of the impending foreclosure sale was insufficient. Specifically, Jackson contends that she had no knowledge and notice of the sale and the subsequent period of redemption.

In *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993), the Supreme Court held:

> Foreclosure sales by advertisement are defined and regulated by statute. Once the mortgagee elects to foreclose a mortgage by this method, the statute governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption.

Therefore, this Court must turn to the applicable statutes. The procedural requirements for foreclosure by publication are found in MCL 600.3208, which provides:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

The statute does not require personal service. *Id.*; *Cheff v Edwards*, 203 Mich App 557, 561; 513 NW2d 439 (1994). Absent the establishment of fraud, accident or mistake, the trial court lacks the authority to set aside a foreclosure sale where the statutory requirements for foreclosing the mortgage were followed. *Freeman v Wozniak*, 241 Mich App 633, 637-638; 617 NW2d 46 (2000), citing *Senters*, *supra* at 55, 57.

The record contains Ron Disner's affidavit in which he averred that, on February 24, 2001, he posted the mortgage foreclosure notice on the premises in a conspicuous place by attaching it to the "right side of door." The record further contains the sworn statement of Janel Rucker, the principal clerk of the printers at The Oakland County Legal News, affirming that notice of the foreclosure sale of the property at issue was printed and circulated in The Oakland County Legal News for at least four consecutive weeks in February and March of 2001. Moreover, Oakland County Deputy Sheriff Matthew J. Chodak averred that an "open and fair" auction was held on March 27, 2001, and the property at issue was sold to Kroll Construction, the highest bidder, for $4,180.57.

Because there was evidence that notice of the sale was published for four successive weeks and posted in a conspicuous area on the premises, there is no dispute that the statutory requirements were followed. As such, summary disposition was appropriate.

Third, Jackson claims that the grossly inadequate sale price and other defects require that the sale be set aside. Michigan law recognizes that the inadequacy of a sale price as it relates to the actual value of property will not invalidate an otherwise fair and regular statutory foreclosure. *Macklem v Warren Constr Co*, 343 Mich 334, 339; 72 NW2d 60 (1955). However, a sale may be set aside if there is a defect, such as fraud, accident or mistake. *Freeman*, *supra* at 637-638. An unusual circumstance may also warrant setting aside the sale. *Mitchell v Dahlberg*, 215 Mich App 718, 724; 547 NW2d 74 (1996).

Jackson initially contends that the foreclosure sale was defective since Kroll Construction foreclosed on Jackson's house before the debt on the mortgage was owing. We previously opined that Kroll Construction had the authority to foreclose because the mortgage was operable and Jackson knew that she owed Kroll Construction money and never made a payment. Thus, this claim is without merit.

Next, Jackson claims that that the contents of the contract for remodeling services violated Michigan's Home Improvement Finance Act, MCL 445.1101 *et seq.*, because it did not contain the requisite notices and contained a prohibited provision requiring the buyer not to assert a claim or defense against an assignee and violated the Federal Truth in Lending Act, 15 USC § 1635, because it failed to provide notice of the right to rescind the mortgage transaction. These alleged irregularities relate to the underlying mortgage, not the foreclosure sale. We previously held that Jackson is precluded from arguing the validity of the underlying mortgage since she failed to challenge the foreclosure by advertisement before the eviction proceedings were initiated and before the lapse of the redemption period. Moreover, in *Ross v Charter One Mo*rtgage, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2005

(Docket No. 251194),[2] this Court refused to set aside a mortgage foreclosure sale based on a claim that the mortgagee failed to comply with notice requirements in the contract. *Id.* This Court reasoned: "A mistake sufficient to justify setting aside the sale must relate to the sale itself; otherwise, the exception would swallow the rule." *Id.* Because Jackson did not allege circumstances relating to the foreclosure sale itself sufficient to warrant the setting aside of the sale, summary disposition was proper.

Fourth, Jackson argues that the Laker Group was not a bona fide purchaser of the property because it had constructive notice of Jackson's presence on the property and knew of a disparity in the price. "A good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 297; 537 NW2d 258 (1995). Where no defect exists in the title transferred, as is the case here, whether a third-party purchaser was a bona fide purchaser is irrelevant. Therefore, on review de novo, we conclude that Jackson's claim lacks merit.

In sum, we conclude that Kroll Construction and the Laker Group presented evidence that Kroll Construction possessed the power to foreclose on the property, provided statutory notice of the impending foreclosure sale, acquired the property at the sale, and that the Laker Group took good title to the property. Jackson failed to establish that there was a genuine issue of material fact necessitating that the foreclosure sale be set aside. Therefore, on review de novo, we hold that the trial court did not err in granting summary disposition in favor of Kroll Construction and the Laker Group and dismissing Jackson's complaint to quiet title and for injunctive relief.

Next, Jackson contends that the trial court failed to apply the proper standard of review for a summary disposition motion under MCR 2.116(C)(10). We disagree.

Jackson cites two areas of misapplication. First, Jackson claims that the trial court failed to review her briefs and documentation in support of her position in making its determination. A court reviewing a motion for summary disposition under MCR 2.116(C)(10) must consider the whole record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence offered by the parties. *Corley*, *supra* at 278.

The trial court stated that the matter was before it based on defendants' motions for summary disposition and ruled that "[t]he Court having reviewed the motions and supporting briefs and documentation, in light of the applicable law, grants summary disposition as to both motions." Jackson's assertion that this statement suggested that the trial court did not review her briefs and documentation in response to defendants' motions is not only highly presumptive, but also incorrect. The cited statement by the trial court was a general statement explaining that it reviewed "the motions and supporting briefs and documentation" and did not otherwise designate the sources used in its review. In addition, the trial court's written order granting

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[2] We view this decision as persuasive, although unpublished opinions are not binding under the rules of stare decisis. MCR 215(C)(1); see also *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004).

summary disposition in favor of Kroll Construction specifically mentions Jackson's answer and brief in opposition to Kroll Construction's motion and references that counsel for the parties argued the matter. Likewise, the trial court's written order granting summary disposition in favor of the Laker Group specifically mentions Jackson's answer, brief and supplemental brief in opposition to the Laker Group's motion and references that counsel for the parties argued the matter. Because the record indicates that the trial court reviewed Jackson's briefs and documentation supporting her position to determine the motions for summary disposition, we conclude that Jackson's claim of error, in this regard, lacks merit.

Jackson also claims that the trial court improperly determined matters of fact and credibility. A review of the record shows that there was no genuine issue of material factual dispute regarding the operability of the mortgage and the validity of the foreclosure. We further conclude that the trial court did not attempt to determine factual and credibility issues below. Accordingly, we hold that the trial court did not use an improper standard of review in deciding the summary disposition motions under MCR 2.116(C)(10).

Finally, Jackson contends that the trial court abused its discretion by denying her motion for approval of an appeal bond and stay of execution pending appeal. We disagree.

Because a trial court has the authority to order a stay of proceedings with or without a bond, we review this issue for an abuse of discretion. See MCR 7.209(E)(1). An abuse of discretion exists where the result below is so palpably and grossly violative of fact and logic that it manifests as a perversity of will, a defiance of judgment or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

An appeal to this Court does not effectuate a stay of the trial court's order, unless this Court or the trial court orders a stay of the judgment. *Bass v Combs*, 238 Mich App 16, 24; 604 NW2d 727 (1999). Pursuant to MCR 7.209(E)(1), a trial court has the authority to "order a stay of proceedings, with or without a bond as justice requires." When an appellant is granted an appeal bond in an action relating to the foreclosure of a mortgage, he must promise to pay the appellee any damages that may result from the stay of proceedings. MCR 7.209(F)(1)(d).

At a hearing below, Jackson argued that the trial court should grant a stay of the judgment pending appeal and allow her to remain in the house, making payments on the mortgages. Jackson asserted that she had a strong reason for paying the mortgages and taxes and that she sought to keep the situation "status quo" until the matter could be resolved on appeal. The trial court denied Jackson's requests for stay and for approval of a stay bond.

We first note that we previously denied Jackson's motion for stay filed with this Court. Furthermore, because there appears to be no injustice evident from the record and the trial court has discretion in this matter, we decline to reverse the trial court's ruling on this matter as we find no abuse of that discretion.

Additionally, we reject Jackson's contention of error regarding the timing of the trial court's entry of the denial of her motion for stay of proceedings. Following the trial court's oral ruling denying Jackson's motion, the Laker Group presented a proposed order, and Jackson admits that she never objected to that proposed order. Accordingly, the trial court entered the written order denying Jackson's motion for approval of an appeal bond and stay of proceedings.

Although Jackson was not served with the written order until after the time in which the writ of restitution could issue, Jackson is precluded from now making what appears to be a claim of ignorance regarding the trial court's decision. See *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003); *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987).

Because this case does not require remand, we need not consider Jackson's argument that, on remand, the trial court judge should be disqualified. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000) (generally, an appellate court will not review an issue that is moot).

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder